

October 20, 2000

Senator Ann O'Connell
7225 Montecito Cir.
Las Vegas, NV 89120-3118

Dear Senator O'Connell:

You have asked this office to discuss the types of loan transactions that would require a mortgage broker and an investor to sign a disclosure form in accordance with the provisions of NRS 645B.185. To answer your question, we must consider several statutes from chapter 645B of NRS and several regulations that became effective on September 5, 2000.

DISCUSSION

Chapter 645B of NRS provides for the regulation of mortgage brokers and mortgage agents. During the 1999 legislative session, the Legislature enacted Assembly Bill No. 64 ("A.B. 64"), which made substantial revisions to chapter 645B of NRS. See chapter 646, Statutes of Nevada 1999, at p. 3744. In section 105 of A.B. 64, the Legislature amended the provisions of NRS 645B.185. Id. at 3796. As amended, the statute now provides in part:

A mortgage broker or mortgage agent 1. shall not accept money from an investor to acquire ownership of or a beneficial interest in a loan secured by a lien on real property unless:

The investor and the mortgage broker or mortgage agent sign (a) and date a disclosure form that complies with the provisions of this section; and

The mortgage broker or mortgage agent gives the investor (b) the original disclosure form that has been signed and dated.

(Emphasis added).

By its plain terms, NRS 645B.185 requires a mortgage broker and an investor to sign a disclosure form for any loan transaction in which the mortgage broker "accept[s] money from [the] investor to acquire ownership of or a beneficial interest in a loan secured by a lien on real property." The provisions of chapter 645B of NRS define "investor" to mean "a person who wants to acquire or who acquires ownership of or a beneficial interest in a loan secured by a lien on real property." NRS 645B.0121. Furthermore, in the preliminary chapter of NRS, the term "person" is defined to mean "a natural person, any

form of business or social organization and any other nongovernmental legal entity." NRS 0.039. Thus, the provisions of NRS 645B.185 are not limited to a particular type of investor.

In contrast, the provisions of NRS 645B.185 are limited to a particular type of loan transaction. Specifically, the provisions of NRS 645B.185 apply only to loan transactions in which a mortgage broker "accept[s] money from an investor." The critical issue then is to determine under what circumstances a mortgage broker is considered to have accepted money from an investor.

The phrase "accept money from an investor" is not defined in chapter 645B of NRS. In the absence of a statutory definition, the phrase has been interpreted by the Commissioner of Financial Institutions ("the Commissioner"). The Commissioner has the statutory duty to "exercise general supervision and control over mortgage brokers doing business in this state." Subsection 1 of NRS 645B.060. The Commissioner also has the statutory authority to adopt regulations that are necessary to carry out the provisions of NRS 645B.185. Subsection 9 of NRS 645B.185. The Commissioner has exercised his statutory authority by adopting the regulations set forth in LCB File No. R045-00 (eff. Sept. 5, 2000) (hereinafter "R045-00"). Section 16 of R045-00 provides:

The commissioner will consider a mortgage broker or 3. mortgage agent to "accept money from an investor to acquire ownership of or a beneficial interest in a loan secured by a lien on real property" within the meaning of NRS 645B.185 and 645B.300 if the mortgage broker or mortgage agent:

Receives money from an investor to acquire ownership of or (a) a beneficial interest in a loan secured by a lien on real property; or

Arranges for the investor to pay money to a third party to (b) invest in a loan secured by a lien on real property.

Under the Commissioner's interpretation of NRS 645B.185, a mortgage broker would be accepting money from an investor within the meaning of NRS 645B.185 if the mortgage broker receives money directly from the investor or if the mortgage broker indirectly controls the money by "arrang[ing] for the investor to pay money to a third party to invest in a loan secured by a lien on real property."

As a general rule of administrative law, if a state agency is given the power to administer certain statutes, then by implication the agency is clothed with the power to interpret those statutes as a necessary incident to its power of administration. Clark County Sch. Dist. v. Local Gov't Employee-Mgmt. Relations Bd., 90 Nev. 442, 446 (1974). Furthermore, "great deference should be given to the agency's interpretation when it is within the language of the statute." Id. This is especially true when the agency's interpretation of the statute is "nearly contemporaneous" with the enactment of the statute. Roberts v. State, 104 Nev. 33, 39 (1988). Thus, when a state agency

interprets a statute, great deference is given to the agency's interpretation if it is reasonable. State Indus. Ins. Sys. v. Miller, 112 Nev. 1112, 1118 (1996). The agency's interpretation of a statute is reasonable if the interpretation is within the language of the statute and is consistent with legislative intent. Id. If the agency's interpretation of the statute satisfies this simple standard of reasonableness, then that interpretation "will not be readily disturbed by the courts." Westergard v. Barnes, 105 Nev. 830, 834 (1989).

We believe that the Commissioner's interpretation of NRS 645B.185 is reasonable because it is within the language of the statute and is consistent with legislative intent. First, the Commissioner's interpretation of NRS 645B.185 has been nearly contemporaneous to the enactment of A.B. 64. In fact, as evidenced in the legislative record discussed below, the Commissioner participated extensively and substantially in the legislative hearings concerning A.B. 64. Thus, given the Commissioner's extensive and substantial participation in the legislative process, his nearly contemporaneous interpretation of NRS 645B.185 is entitled to "great weight." See Roberts, 104 Nev. at 39.

Second, as a general rule of statutory construction, when the words in a statute are not defined, "[they] should be given their plain meaning unless this violates the spirit of the act." McKay v. Bd. of Supervisors, 102 Nev. 644, 648 (1986). To arrive at the plain meaning of statutory language, a reviewing court usually relies upon dictionary definitions because those definitions reflect the plain and ordinary meanings that are commonly ascribed to words and terms. See 2A Sutherland Statutory Construction § 46.02 (5th ed. 1992); Cunningham v. State, 109 Nev. 569, 571 (1993).

To "accept" means "to receive willingly." Webster's Ninth New Collegiate Dictionary 48 (1991). To "receive" means "to come into possession of." Id. at 982. "Possession" means "the act of having or taking into control." Id. at 918. Finally, to "control" means "to exercise restraining or directing influence over . . . to have power over." Id. at 285. By applying these dictionary definitions to NRS 645B.185, we believe that the statute requires a mortgage broker and an investor to sign a disclosure form for any loan transaction in which the mortgage broker exercises significant influence over the money of the investor. Furthermore, we believe that when a mortgage broker receives money directly from the investor or when a mortgage broker indirectly controls the money of the investor by "arrang[ing] for the investor to pay money to a third party to invest in a loan secured by a lien on real property," the mortgage broker is exercising significant influence over the money of the investor within the plain meaning of NRS 645B.185. Therefore, given the foregoing dictionary definitions, we believe that the Commissioner's interpretation of NRS 645B.185 is reasonably consistent with the plain meaning of the statute.

Finally, we believe that the Commissioner's interpretation of the statute is consistent with the legislative intent behind A.B. 64 and with the rule that "[s]tatutes with a protective purpose should be liberally construed in order to effectuate the benefits intended to be obtained." Colello v. Adm'r of Real Estate Div., 100 Nev. 344, 347 (1984); see also Welfare Div. v. Washoe County Welfare Dep't, 88 Nev. 635, 637

(1972) ("[When] legislation is remedial in nature . . . [it] should be afforded liberal construction to accomplish its beneficial intent.").

Assemblyman David Goldwater served as the Chairman of the Legislative Commission's Subcommittee to Investigate Regulation of Mortgage Investments in Nevada, and he was the primary sponsor of A.B. 64. During testimony before committees in both houses, Assemblyman Goldwater indicated that the primary purpose of A.B. 64 was the protection of consumers. See, e.g., Minutes of the Assemb. Comm. on Commerce and Labor, 70th Leg., at 2-11 (Feb. 17, 1999); Minutes of the Senate Comm. on Commerce and Labor, 70th Leg., at 2-7 (May 20, 1999). Assemblyman Goldwater also indicated that "disclosure was 'the meat' of the bill," Minutes of the Assemb. Comm. on Commerce and Labor, 70th Leg., at 6 (Feb. 17, 1999), and that "the bill addressed and required a great deal of disclosure." Minutes of the Assemb. Comm. on Commerce and Labor, 70th Leg., at 20 (Apr. 7, 1999). With regard to A.B. 64, Senator Randolph Townsend, Chairman of the Senate Standing Committee of Commerce and Labor, "stressed the importance of disclosure documents before any investment agreements are entered into. He asserted the public needs to understand, when considering these kinds of investment, that they are not insured institutions; there are no guarantees and these are investments with risk." Minutes of the Senate Comm. on Commerce and Labor, 70th Leg., at 5 (May 20, 1999). In a similar vein, Marty LeVasseur, State President of the Nevada Association of Mortgage Brokers, "emphasized the important things being requested [in A.B. 64] are strengthening of the disclosure and power-of-attorney laws." Minutes of the Senate Comm. on Commerce and Labor, 70th Leg., at 22 (May 25, 1999). Finally, Scott Walshaw, the Commissioner of Financial Institutions, believed that "the most important parts of A.B. 64 are the power-of-attorney changes, and the improving of disclosure requirements." Minutes of the Senate Comm. on Commerce and Labor, 70th Leg., at 4 (May 27, 1999).

In light of the legislative record, we believe that the Legislature intended NRS 645B.185 to be liberally construed for the protection of investors. As a result, we believe that, for most loan transactions, the Legislature intended that a mortgage broker would be required to provide an investor with a disclosure form. Because section 16 of R045-00 is intended to require a mortgage broker to provide an investor with a disclosure form for most loan transactions, the Commissioner's interpretation of NRS 645B.185 is consistent with legislative intent. Therefore, it is the opinion of this office that the Commissioner's interpretation of NRS 645B.185 is reasonable because it is within the language of the statute and is consistent with legislative intent.

However, even under the most liberal construction of NRS 645B.185, it would be unreasonable to interpret the statute to apply to every loan transaction between a mortgage broker and an investor. A mortgage broker is authorized by chapter 645B to engage in a variety of loan transactions. Specifically, NRS 645B.0127 provides:

"Mortgage broker" means a person who, directly or 1. indirectly:

Holds himself out for hire to serve as an agent for any (a) person in an attempt to obtain a loan which will be secured by a lien on real property;

Holds himself out for hire to serve as an agent for any (b) person who has money to lend, if the loan is or will be secured by a lien on real property;

Holds himself out as being able to make loans secured by (c) liens on real property;

Holds himself out as being able to buy or sell notes (d) secured by liens on real property; or

Offers for sale in this state any security which is exempt (e) from registration under state or federal law and purports to make investments in promissory notes secured by liens on real property.

Not all of the loan transactions described in NRS 645B.0127 would result in the mortgage broker exercising significant influence over the money of the investor for purposes of NRS 645B.185 and section 16 of R045-00. In particular, we can envision at least two types of loan transactions that would fall outside the scope of those provisions.

First, an investor could hire the mortgage broker to find borrowers who qualify for loans to be made by the investor. If the mortgage broker finds such a borrower, and the investor disburses the loan money directly to the borrower or to a fiduciary of the borrower whose services are not in any way being arranged or influenced by the mortgage broker, then the mortgage broker would be acting as an agent for the investor, but he would not be accepting money from the investor.

Second, a borrower could hire the mortgage broker to find an investor who is willing to lend money to the borrower. If the mortgage broker finds such an investor, and the investor disburses the loan money directly to the borrower or to a fiduciary of the borrower whose services are not in any way being arranged or influenced by the mortgage broker, then the mortgage broker would be acting as an agent for the borrower, but he would not be accepting money from the investor.

In the two situations described above, the provisions of NRS 645B.185 and section 16 of R045-00 are not implicated because the investor disburses the loan money directly to the borrower or to a fiduciary of the borrower whose services are not in any way being arranged or influenced by the mortgage broker. Under such circumstances, it would be reasonable to conclude that the mortgage broker is not exercising significant influence over the money of the investor and thus is not accepting money from the investor within the meaning of NRS 645B.185 and section 16 of R045-00.

We caution, however, that each loan transaction involving a mortgage broker and an investor is a unique and complicated financial affair that involves several parties, several fiduciaries and several complex legal documents. This letter is intended only as

a general discussion concerning the application of NRS 645B.185 and section 16 of R045-00 in the abstract. To make a determination of whether those provisions would apply to any specific loan transaction, there would have to be a detailed analysis of the legal documents governing the transaction and a thorough investigation of the relationship between the parties and the fiduciaries to the transaction.

CONCLUSION

It is the opinion of this office that, by adopting section 16 of R045-00, the Commissioner has adopted a reasonable interpretation of NRS 645B.185 that is within the language of the statute and is consistent with legislative intent. Under the Commissioner's interpretation, a mortgage broker would be accepting money from an investor within the meaning of NRS 645B.185 if the mortgage broker receives money directly from the investor or if the mortgage broker indirectly controls the money by "arrang[ing] for the investor to pay money to a third party to invest in a loan secured by a lien on real property." In essence, a mortgage broker "accept[s] money from an investor" within the meaning of NRS 645B.185 and section 16 of R045-00 any time the mortgage broker exercises significant influence over the money of the investor during the course of a loan transaction. If, however, the mortgage broker does not exercise significant influence over the money of the investor during the course of a loan transaction, then the provisions of NRS 645B.185 and section 16 of R045-00 would not be implicated. For example, if the investor in a loan transaction disburses the loan money directly to the borrower or to a fiduciary of the borrower whose services are not in any way being arranged or influenced by the mortgage broker, then it would be reasonable to conclude that the mortgage broker is not exercising significant influence over the money of the investor and thus is not accepting money from the investor within the meaning of NRS 645B.185 and section 16 of R045-00.

If you have any further questions regarding this matter, please do not hesitate to contact this office.

Very truly yours,

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Ref No. O'Connell001019101952